**SYARIKAT PENDIDIKAN STAFFIELD BHD** A

**v.**

**KETUA PENGARAH HASIL DALAM NEGERI**

HIGH COURT MALAYA, KUALA LUMPUR B
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2(3)-25-10-09]
11 JANUARY 2011

***ADMINISTRATIVE LAW:*** *Judicial Review - Certiorari and Mandamus - Income Tax (Exemption) (No. 5) Order 2008 - Whether applicant qualified for tax exemption under said Order - Whether operating surplus distributed or applied for the benefit of individuals or commercial companies - Whether applicant's income and property applied solely towards promotion of company's object - Whether applicant profit oriented organization* C D

***REVENUE LAW:*** *Income tax - Companies - Applicant's sole business to operate and maintain a college - College education provided in exchange for payment - Income not used for charitable or beneficent purpose - Whether applicant exempted from tax - Profits could not be distributed to members - Surplus used solely to promote applicant's objectives - Whether applicant profit oriented organization - Income Tax (Exemption) (No. 5) Order 2008* E

The applicant company, whose sole business was to operate and maintain a college in Mantin ('the college'), applied for tax exemption under the Income Tax (Exemption) (No. 5) Order 2008 ('the Order'). The Order was issued by the Minister of Finance ('the Minister') pursuant to s. 127(3)(b) Income Tax Act 1967 ('the Act'). The Order states *inter alia* that the college should be a non-profit oriented school *ie*, that, it was not operated or conducted for profit. The respondent submitted that the applicant did not satisfy this requirement and rejected the application. The applicant applied for judicial review for the following orders: (i) an order of *certiorari* to quash the respondent's decision; (ii) a declaration that the applicant qualifies for tax exemption under the Order; and (iii) an order of *mandamus* commanding the respondent to give full effect to (i) and (ii) above. The respondent contended *inter alia* that the applicant's management of the college was profit oriented in nature as the applicant provided education in exchange for direct and substantial payment. Additionally, the profit was not used for charitable or beneficent purposes. The issue to be F G H I

A determined was whether the applicant could be considered as a non-profit organisation when it generated surplus and accumulated revenue.

**Held (allowing the application with costs):**

B **(1)** An organization should be regarded as being non-profit where, by its constituent documents or by operation of law, it was prevented from distributing its profits or assets to owners, members or any other individual or group of individuals when it was operating and on winding up. It was clear that by the C applicant's constitution, the operating surplus could not by law be distributed or applied for the benefit of individuals or commercial companies. The applicant's income and property were applied solely towards the promotion of the object of the company. (paras 28, 29 & 30)

D **(2)** The charitable object, for which the applicant was incorporated, was for the establishment and maintenance of residential school or schools or other educational establishments and the encouragement of education in E accordance with the laws of Malaysia. (para 36)

**(3)** Section 127(3)(b) of the Act enables the Minister by statutory order to exempt any class of persons (including companies) from all or any provisions of the Act. The intention of the F Minister is to provide exemption from what will otherwise be taxable income for 'qualifying persons' within the definition of the Order. This is to ensure that more money is available for the educational objectives for which a company is set up. (paras 37 & 39)

G **Case(s) referred to:**

*Commissioner of Taxation v. Word Investments Ltd [2007] FCAFC 171* ***(refd)***

*Creror v. Williams 145 III* ***(refd)***

*Kennemer Golf and Country Club v. Staotssecretories Van Financiën and* H *Customs and Exercise Commissioner v. Zoological Society of London [2002] QB 1252* ***(refd)***

*Longborough Festival Opera v. Revenue and Customs Commissioners [2006] STC 818* ***(refd)***

*Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd [2004] 2 CLJ 265 FC* ***(refd)***

I

**Legislation referred to:**
Income Tax Act 1967, ss. 44(6), 127(3)(b)
Income Tax Exemption (No 5) Order 2008, O. 2
Interpretation Acts 1948 and 1967, s. 17A

*For the applicant - Dato' WSW Davidson (Karen Ng with him); M/s Azman Davidson & Co*
*For the respondent - Shafini Abdul Samad (Normareza Mat Rejab with her) AG's Chambers*

*Reported by Melinda Robert*

## JUDGMENT

**Mohd Zawawi Salleh J:**

### Introduction

**[1]** This is an application by the applicant for judicial review for the following orders:

(a) An order of *certiorari* to quash the respondent's decision made by letter dated 5 December 2008 holding that the applicant does not qualify for exemption from income tax under Income Tax Exemption (No. 5) Order 2008, dated 10 June 2008;

(b) A declaration that the applicant qualifies for exemption from income tax under the said order; and

(c) An order of *mandamus* commanding the respondent to give full effect to (a) and (b) above.

### Facts Of The Case

**[2]** The facts of the case are fully set out in the applicant's affidavit in support (encl. 3). The salient point are as follows:

(a) The applicant was incorporated on 8 July 1998 as a company limited by guarantee without shareholders under the Companies Act 1965.

(b) It will be seen from the Memorandum of Association that:

A (i) By cl. 3 the company has only one object, namely "the establishment and maintenance of a residential school or schools or other education establishments .. for the promotion, propagation and encouragement of education ..."

B (ii) By cl. 5 "the income and property of the company, whencesoever derived, shall be apportioned solely toward the promotion of the objects of the company, as set forth in the Memorandum of Association; and no portion thereof C shall be paid or transferred directly or indirectly by way of dividend, bonds or otherwise to the members of the company ..."

(c) From the very outset, the company's operations have been and still are solely confined to the establishment and operation D of Tuanku Ja'afar Kolej at Mantin, Negeri Sembilan, and it has no other business whatsoever.

(d) The college was launched on 5 June 1989 and the operation of the college commenced on 6 January 1991. The college E runs two parallel streams for secondary education up to Form 5, that is the KBSM Malaysian stream, students follow the Government syllabus and sit for the PMR and SPM examinations at ages 14/15 and 16/17 respectively, while international stream students work towards Cambridge and F London 'O' levels or International GCS examinations in Form 5. Students from both the Malaysian and International streams study 'A" levels in the lower and upper sixth forms.

(e) The college is recognized by and is registered with the G Ministry of Education, Malaysia.

(f) On 4 May 2006, an order cited as the Income Tax (Exemption) (No. 20) Order 2006 was issued under the Income Tax Act 1967 by the Minister of Finance effective 10 September 2004 under powers granted by s. 127(3)(b) of H the Income Tax Act. The effect of this order is to grant income tax exemption, *inter alia*, to companies limited by guarantee not operated for profit whose function is solely for the purpose of establishing and managing an international school. The company sought to bring the college within the I exemption, but by letter dated 23 August 2007, the

respondent wrote to the applicant's tax agents informing them that the college did not qualify under that exemption as it did not function solely as an international school.

(g) Subsequently, however, in or around September 2007, in a speech on the 2008 Budget, the Minister of Finance made the following commitment:

> The Role of Charity Organizations in Education
>
> 54. The Government recognizes that a number of primary and secondary schools have been funded and well managed by trust and charitable bodies. To support their efforts the Government proposes that the schools be given income tax exemption. The exemption will benefit particularly Chinese and Tamil Schools as well as religious schools.

(h) Subsequently, the Minister of Finance fulfilled this commitment by issuing on 10 June 2008 an order cited as the Income Tax (Exemption) (No. 5) Order 2008, also under the powers granted by s. 127(3)(b) of the Income Tax Act. This order is deemed to be effective from the year of assessment 2008.

(i) The applicant has been advised by their solicitors that the company fulfils all the qualifications for this exemption.

(j) On 17 October 2008, on the applicant's instructions, M/s PricewaterhouseCoopers, their tax agents, wrote to the Respondent to seek confirmation that the company was entitled to exemption under the Income Tax (Exemption) (No. 5) Order 2008.

(k) By letter dated 5 December 2008, the respondent replied to the said letter stating that the company does not qualify for the exemption under the said order.

(l) The applicant being not satisfied with the respondent's decision in their letter dated 5 December 2008 ("the Impugned Decision"), filed this application for judicial review.

**[3]** The sole question to be decided by the court is simply this: whether, under the facts present here, the appellant in this case qualifies for an exemption from taxation under the Income Tax (Exemption) (No. 5) Order 2008.

**[4]** This presents a mixed question of law and fact and the Impugned Decision will be quashed only if the court is left with definite and firm conviction that an error of law has been committed by the respondent.

**Applicant's Submissions**

**[5]** The applicant submits that the company fulfils all the requirements for this exemption because:

(i) it is a company limited by guarantee registered under the Companies Act 1965;

(ii) its residence is in Malaysia;

(iii) its function is solely for the purpose of establishing and managing a non-profit oriented school;

(iv) it is registered under the Education Act 1996 and is approved and recognized by the Ministry of Education, Malaysia;

(v) it is not operated or conducted for profit; and

(vi) it is not at this stage approved under s. 44(6) of the Income Tax Act.

**Respondent's Submission**

**[6]** The respondent submits that the college is operated or conducted for profit. According to the respondent, the applicant is in fact managing a profit oriented college based on the following facts:

(i) it does not provide education for free nor does it charge a nominal fee;

(ii) it receives substantial income from tuition fees;

(iii) it receives income from other sources;

(iv) it receives a high profit for the Financial Year ended 2005, 2006 and 2007. This defies the norm of non-profit oriented school;

(v) its trustees have the discretion to declare payment of bonus interest (to debenture holders) from its profit. This is in addition to the annual interest payment due to its debenture holder. This shows that the applicant is a profit oriented college;

(vi) its expenses towards advertisement and promotions for the purpose of recruiting student for the school is RM303,106;

(vii) it has claimed for tax relief in the Year of Assessment 2006 and previous years under Income Tax (Deduction for Promotion of Export of Services) Rules 1999 and 2002. This incentive is available only to a business venture.

**[7]** The respondent posits that the above facts lead to one conclusion, that is, the applicant's management of the college is profit oriented in nature. The applicant is in the business of providing education for profit and the applicant operates according to the ordinary business practices of commercial education providers.

## Findings Of The Court

**[8]** Under our law, taxation is the rule and tax exemption is the exception. All profits are subjected to taxation unless exempted by statute. Statutes granting tax exemptions must be strictly construed in favour of taxation and courts have no power to create exemption from taxation by judicial construction.

**[9]** The burden of establishing entitlement to a tax exemption rests upon a person seeking it. The burden is a very heavy one. The party claiming an exemption must prove by clear and convincing evidence that the profit in question falls within the terms of the statute which the exemption is claimed. A basis for exemption may not be inferred when none has been demonstrated.

**[10]** The operative part of the Exemption (No. 5) Order 2008 reads as follows:

> The Minister exempts any qualifying person from the payment of income tax in respect of the statutory income in relation to any income received from the management of a **non-profit oriented school**. (emphasis added)

**[11]** Order 2 of the Exemption Order defines "a non-profit oriented school" as a school which is:

(a) registered under the Education Act 1996 (Act 550);

(b) approved and recognized by the Ministry of Education of Malaysia;

(d) not operated or conducted for profit.

**[12]** The respondent concedes that all the requirements under the Exemption Order are met by the applicant except the criterion which require that the school is not operated or conducted for profit. The nub of the respondent's submission is that the term profit refers to what is available by way of distribution to members or shareholders.

**[13]** The respondent urges the court to adopt a purposive approach in determining the term profit. (see the case of *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oil Sdn Bhd* [2004] 2 CLJ 265, (FC) and s. 17A of the Interpretation Acts 1948 and 1967). In this regard, the relevant portion of the Minister of Finance's Budget Speech which led to the 2008 Exemption Order is as follows:

> The Role of Charity Organizations in Education
>
> 54. The Government recognises that a number of primary and secondary schools have been funded and well managed by trust and charitable bodies. To support their efforts, the Government proposes that these schools be given income tax exemption. This exemption will benefit particularly Chinese and Tamil schools, as well as religious schools.

**[14]** The respondent contends that the speech shows that the Exemption Order was meant for organisation that are charitable in nature. The aim of the benefit is Chinese, Tamil and religions schools. The Exemption order could not have been intended for an exclusive and elitist school such as Kolej Tunku Jaafar. Facts which negate the fact that the applicant is a charitable body are as follows:

(i) Same rate of tuition fees charged per student during the year 2009 were RM8,600 per term or RM25,000 per year, regardless of PMR, SPM, O Level or A Level student. (para. 17 of affidavit in reply of applicant and para. 15 of afidavit jawapan responden 2). In Malaysia, such huge amount cannot be afforded by the needy or poor, hence it is not for the benefit of public at large. The comparison of fees for year 2009 as shown by the applicant in exh. "S" of affidavit in reply of applicant is not a fair comparison because the schools/colleges which are stated in the comparison list are all international schools, whereas the applicant is not an international school; and

(ii) the applicant commenced legal action for the recovery of fees amounting to RM13,975 (refer schedule 26(1,1) of Tax Computation, exh. "NBI1" of encl. 12). This indicates that the applicant is calculative of figures in its cashflow and will not forego any sum owing to it.

**[15]** Further, the college's policies gathered from the applicant's website show that:

(i) The registration form must be accompanied by a registration fee of RM300. This is not refundable;

(ii) Confirmation of acceptance of the applicant's offer should be accompanied by the payment of a deposit of RM20,000 and the acceptance fee of RM3,000 within the deadline stated in the offer letter;

(iii) Fees are payable on a term basis; all fees and charges shall be payable at the beginning of the term to which they relate. A 10% interest payment from the date of the original account may be charged on accounts outstanding after seven days;

(iv) A student may not start a new term if the previous term's fees and charges have not been paid, unless the Principal or the Board of Trustees expressly waives this condition; and

(v) Parents should give the applicant written notice of their intention to withdraw their child from school at least one clear term prior to the date on which the student is actually withdrawn. In default of such notice, the deposit of RM20,000 will be forfeited.

**[16]** The crux of the respondent's submission seems to be: the appellant did not provide free education for indigent students. The education was provided in exchange of direct payment to the appellant. The number of the needy and poor students are non-existence. Further undermining the appellant's claim of charity is that they did not offer discounted fees. The defining characteristics of a charitable institution, include, *inter alia*, that the institution dispenses charity to all who need it and apply for it, and that it does not appear to place any obstacles in the way of those who need and would avail themselves of the charitable benefit it dispenses.

**[17]** According to respondent, in this instant case, the profit was not used for charitable or beneficent purposes. In explaining what constitutes charity, the United States Court in *Creror v. Williams*, 145 III at p. 643, had this to say:

> 'charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government.

**[18]** The reason for exemptions in favour of charitable institutions is the benefit conferred upon the public by them, and consequent relief, to some extent, of the burden upon Government to advance the interest of its citizen. Conditioning charitable status on whether an activity helps relieve the burden on government is appropriate. After all, each tax ringgit lost to a charitable exemption is one less ringgit affected government bodies will have to meet their obligation directly. If a charitable institution wishes to avail itself of funds which would otherwise flow into a public treasury, it is only fitting that the institution provide some compensatory benefit in exchange. While Malaysian law has never required that there is direct, ringgit-for-ringgit correlation between the value of the tax exemption and the value of the goods or services provided by the charity, it is a *sine qua non* of charitable status that those seeking a charitable exemption be able to demonstrate that their activities will help alleviate some financial burden incurred by the affected taxing bodies in performing their governmental functions.

**[19]** With respect, the court disagrees with the submission of the respondent. There is some confusion on the part of the respondent regarding the meaning non-profit oriented school. The main confusion regarding non-profit requirement is whether it is compatible with charitable status for the school to charge high fees on students in order to maximize the income for it to pursue of its goal. It would appear that the term non profit itself is misunderstood by the respondent who believes that companies so classified should generate no surpluses and accumulate no reserves.

**[20]** In the case of *Commissioner of Taxation v. Word Investments Ltd* [2007] FCAFC 171, the Full Court of the Federal Court of Australia considered whether an organization, operating as a for-profit commercial entity, could be considered a charitable institution for charity endorsement purposes if its profits are given to another charitable body. In that case, from 1996 until 30 June 2002, Word Investments Limited (Word Investments), an evangelical missionary organization, raised funds through the operation of a funeral business, Bethel Funerals.

**[21]** Bethel Funerals operated in a normal commercial manner of deriving revenue, incurring expenses and earning profits. Its profits were applied predominantly to Wycliffe Bible Translators Australia (a tax exempt charity for whom Word Investments was established), but also to other Christian organizations. On 1 July 2002, Word Investments created a trust to hold and conduct Bethel Funerals, after which Word Investments itself was not beneficially engaged in that business.

**[22]** When Word Investments applied to the Australian Taxation Office for endorsement as a charity pursuant to Subdivision 50-B of Division 50 of Part 2-15 of the Income Tax Assessment Act 1997 (Cth), endorsement was refused by the Commissioner. The subsequent appeals and cross appeals to the Administrative Appeals Tribunal, Federal Court and the Full Court of the Federal Court of Australia all debated whether Word Investments should be granted endorsement as a charitable institution during the time when it operated Bethel Funerals, or even if at all.

**[23]** As Allsop J stated in this case, the primary issue was 'whether or not a company, having an avowedly charitable purpose in the disposition of all its profits, is to be denied the character of a charitable institution because of the activities by which it gains its profit do not, of themselves, bear the character of charity'.

**[24]** The Full Court of the Federal Court of Australia affirmed the view of the Federal Court judge that the true question to be asked is the purpose of making the profit, rather than the sole analysis of the nature of the activities of the business. In taking this approach, the court rejected the commissioner's submission that a charitable entity could only conduct commercial activities as incidental or ancillary to the entity's charitable activities. The court

A instead found that the proper task is an integrated and holistic enquiry to assess the true character of the entity by reference to its objects, purposes and activities.

**[25]** The Full Court of the Federal Court of Australia concluded
B that although Word Investments was not a religious entity, it was incorporated for the object of charitable purposes for the clear purpose of raising funds for charitable use. This was considered sufficient to characterize Word Investments as charitable.

**[26]** This case provides an important change from the previous
C view that the conduct of commercial 'non-charitable' activities will render the entity non-charitable. Rather, a charitable organization can conduct non-inherently charitable activities so long as the clear and exclusive purpose is to raise funds to deploy in ways that are charitable. The characterization of an organization will
D therefore be determined by an enquiry into the organization's activities as set out in a constitution or memorandum and the legal constraint under which the directors work.

**[27]** It is settled, therefore, that non profit organizations can
E engage in any business enterprise in the fulfilment of their mission objective without affecting their tax-exempt status. They are free to do anything a for-profit company might do in pursuit of their goals, including making profit. The real concern is whether any portion of the profit received by the organization is permitted to
F inure to the benefit of any private individual engaged in managing the organization.

**[28]** In the instant case, the applicant has made operating surplus, as its account will show, but there are no distributable
G profits to its shareholders because there are no shareholders, and although there are members, they are strictly prohibited from receiving any distribution of profit. The Memorandum and Articles of the company make it clear that the income and property of the applicant are to be applied solely towards the promotion of the
H object of the company.

**[29]** An organization should be regarded as being non-profit, where, by its constituent documents or by operation of law (for example a statute governing an organization), it is prevented from
I distributing its profits or assets to owners, members or any other individual or group of individuals when it is operating and on winding up. In this instant case, the Applicant's Constitution itself bear witness that:

(i) the income and property of the company, … shall be applied solely towards the promotion of the objects of the company, as set forth in the Memorandum of Association; and no portion thereof shall be or transferred directly or indirectly by way of dividend, bonds or otherwise to the members of the company and no trustee shall receive any scholarships, grants loans or other assistance in connection with the charitable objects for which the company is established.

(ii) Even in the case of a winding up of the company, there is a prohibition on a distribution to members of the company and any surplus can only be apportioned to other institutions as approved by the Director General of Inland Revenue.

(iii) The company has no shareholders and its members' role is limited to attending and voting at meetings etc.

**[30]** It is, therefore, clear that by the constitution of the company, the operating surplus from the operations of the company cannot by law be distributed or applied for the benefit of individuals or commercial companies. In the applicant's second affidavit, the applicant has provided evidence to show that in the years from 2006, the applicant has ploughed back over RM20,416,623 in improving the facilities for the school.

**[31]** For this purpose, the court adopts the reasoning of the court in *Kennemer Golf and Country Club v. Staotssecretories Van Financiën and Customs and Exercise Commissioner v. Zoological Society of London* [2002] QB 1252, where it was held at p. 1253 that:

> an organization was non-profit-making if it did not have the aim, such as that of a commercial undertaking, of achieving profits for its members, and, provided that that was so, the fact that the organization made operating surpluses, even if it sought to make them or did so systematically, did not affect that categorization, so long as the surpluses were not distributed to the organization's members as profits.

**[32]** At p. 1261, the following opinion was delivered:

> First, I agree with what appears to be the consensus of the Finnish and United Kingdom Governments and the commission, that the idea of profit-making in this context relates to the enrichment of natural or legal persons – in particular those having a financial interest in the organization in question – rather than to

A whether in any given period the organization's income exceeds its expenditure. The concept of a non-profit-making organization contrasts essentially with that of a commercial undertaking run for the profit of those who control and/or have a financial interest in it.

B Secondly, in accordance with most of the language versions, the focus must be on the aims of the organization concerned rather than on its results – the mere fact that an entity does not make a profit over any given period is not enough to confer non-profit-making status. Moreover, from the fact that "non-profit-making" C is used to qualify "organization", it would seem that the aims in question are those which are inherent in the organization rather than those which it may be pursuing at a particular point in time.

**[33]** The second case decided in the Chancery Division of the High Court is *Longborough Festival Opera v. Revenue and Customs* D *Commissioners* [2006] STC 818 at p. 819; [2006] EWHC 40. In that case, it was held that the Longborough Festival Opera ("LFO") satisfied the condition that an eligible body must be legally incapable of distributing its profits in favour of its members or directors and must not do so. The mere fact that a director E might not be legally prohibited from receiving a payment for which provision was made under the LFO constitution, and in fact did receive such a payment, would not disqualify LFO for eligibility.

**[34]** It may be noted that in the instant case, not only is the F distribution of profits to members prohibited, but also payments to trustees are prohibited.

**[35]** At p. 827 of the judgment, the High Court Judge specifically affirmed the statement of the law in *Kennemer*'s case:

G I turn now to the first condition in the first indent that the cultural bodies to be exempted shall not systematically aim to make a profit. In this condition 'profit' means the enrichment of, or conferment of financial advantages on, natural or legal persons and in particular those who control or have a financial interest in or H are members of it. The focus is on the aims of the body, and not the results of its activities. The law is succinctly stated by Advocate General Jacobs in *Kennemer* [2002] STC 502, [2002] QB 1252:

> 45. First, I agree … that the idea of profit-making in this I context relates to the enrichment of natural or legal persons – in particular those having a financial interest in the organization in question – rather than to whether in any

> given period the organization's income exceeds its expenditure. The concept of a non-profit-making organization contrasts essentially with that of a commercial undertaking run for the profit of those who control and/or have a financial interest in it.
>
> 46. Second, in accordance with most of the language versions, the focus must be on the aims of the organization concerned rather than on its results – the mere fact that an entity does not make a profit over any given period is not enough to confer non-profit-making status. Moreover, from the fact that "non-profit-making" is used to qualify 'organisation', it would seem that the aims in question are those which are inherent in the organisation rather than those which it may be pursuing at a particular point in time.

**[36]** It should be emphasized that in this instant case, the charitable object for which the company is incorporated is the establishment and maintenance in accordance with the laws of Malaysia of residential school or schools or other educational establishment and encouragement of education.

## Conclusion

**[37]** The Exemption Order in question is issued pursuant to s. 127(3)(b) of the Income Tax Act 1967. This is a section which enables the Minister by statutory order to exempt any class of persons (which of course includes Companies) from all or any of the provisions of the Act. The avowed purpose of the Exemption Order is therefore to provide exemption for income which could otherwise be taxable.

**[38]** If not operated or conducted for profit meant 'not operated or conducted to make an operating surplus', there would be absolutely no point in providing the exemption since persons or companies not making an operating surplus have no exposure to income tax.

**[39]** Clearly, therefore, the intention of the Minister is to provide exemption from what would otherwise be taxable income for 'qualifying persons' within the definition in the Exemption Order. This concession does not and cannot go to provide relief to

members of the company since this is strictly prohibited. What it does is to ensure that more money is available to plough into the educational objectives for which the company was set up.

**[40]** Based on the reasons above stated, I would allow the application with costs.